IN THE HIGH COURT OF BOMBAY AT PANAJI.

CRIMINAL APPEAL NO.22 OF 2006

Ron Chayak,
Presently lodged in Central Jail Aguada,
Sinquerim, Bardez, Goa. ..... Appellant

V e r s u s

State of Goa,
as represented by
Officer in charge
Anti Narcotic Cell P.S.
Panaji, Goa. ..... Respondent

Mr. J. P. D' Souza, Advocate for the Appellant.

Ms. Winnie Coutinho, Public Prosecutor for the State/Respondent.

CORAM: N. A. BRITTO, J.

DATE: 2nd March, 2007 &
9th March, 2007.

ORAL JUDGMENT

The appellant herein is an accused and shall be referred to as such, hereinafter.

2. The accused has been convicted and sentenced on a charge which reads as follows:

> "That on or about 02.12.2002 between 17.30 to 21.30 hrs. at Sonnathwada, Anjuna, you were found in illegal possession of 10 grams of charas on your person and in possession of 1.31 kgs. of charas in the rented room of Maria Fernandes in your possession without any legal documents.
>
> You have thereby committed offence punishable under Section 20 (b)(ii) of Narcotic Drugs and Psychotropic Substances Act, 1985, read with Section 20(b) (C) of Narcotic Drugs and Psychotropic Substances Act, 2001 and within my exclusive jurisdiction."

3. The accused has challenged the conviction and sentence imposed upon him by the learned Special Judge, Narcotic Drugs and Psychotropic Substances Court, Mapusa, by Judgment/Order dated 08.03.2006.

4. The case of the prosecution, in brief, is that the raid was conducted by PI Uday Naik/Pw4 of ANC Police Station, upon receipt of prior information, in room no. 4 of Silver Moon Guest House, at Sorrontowadda, Anjuna, in the presence of PI Vincy Paes/Pw7, in charge of the said Police Station, and Dy.S.P. Shri Finton D' Souza/Pw5, being the next Superior Officer, and, in the presence of two panch witnesses, namely Vijay Surlekar/Pw3 and Mustaq A. Bengre, who was not examined. To support its case, the prosecution examined eleven witnesses.

5. The case of the accused was that he was falsely implicated. The accused had also taken a plea that the said room was occupied by another Israeli National by name Ms. Maya Patt.

6. As per the version of PI Uday Naik/Pw4, the accused was staying in room no.4 of Silver Moon Guest House at Sorrontowadda, Anjuna and was selling charas in the said room, which information he reduced in writing and handed over personally to Shri D' Souza/Pw5, and thereafter, at about 15.30 hours, he secured the presence of the said two panch witnesses and told them about the receipt of the said reliable information and after introducing them to the members of the raiding party, proceeded to Sorrontowadda at Anjuna, and after alighting from the vehicle and confirming the location of the said room no.4, they all proceeded towards the said room at about 17.15 hours and on seeing room no.4, the number of which was written on the door frame, he knocked at the door, which was opened by the accused who matched the stated description, and thereafter introduced himself and the raiding party to him and told him that he wanted to take his personal search for charas after informing him that he had a right to be searched before a Gazetted Officer or Magistrate and that he also had a right to search the members of the raiding party including the panchas, which offers the accused declined and during the personal search, he found on his person 10 grams of charas, which he put in an envelope, packed and sealed and thereafter a search of the said room being

conducted, he found a polythene bag near the dressing table and which had 1.31 kgs of suspected charas which he also put in an envelope, packed and sealed and signed the same. As per him, during a further search of the said room, he had found 58 US dollars, Rs.400/-, etc., which were also put in an envelope, packed and sealed and signed, as before. He stated that the passport of the accused was also found and so also another red and blue colour resin bag beneath the cot and the clothes found in the room were put in the said bag. He also stated that he took away the key of the room to be handed over to the owner and prior to that he prepared two letters on the spot, one addressed to the Director, Food and Drugs Administration, Panaji, and the other addressed to the S.P., for handing over the seal. The first letter was marked exhibit 10 and the second letter was marked exhibit 32. He further stated that he returned to the Police Station at about 23.45 hours, where he registered an offence against the accused. He stated that he handed over the muddemal property to PI Shri Vincy Paes/Pw7 and the seal was handed over to Shri D' Souza/Pw5, and as on the next date, he had to proceed to Delhi, he handed the case papers to PI Shri Paes/Pw7 on 03.12.2002 and obtained the same, upon his return on 11.12.2002.

7. The first controversy raised on behalf of the accused by learned Counsel Shri D' Souza, is that both the witnesses taken by Shri Uday Naik/Pw4, were not independent witnesses and, therefore, no reliance could be placed on the

evidence of Shri Surlekar/Pw3, who has been examined. The learned trial Court after relying upon various decided cases, has come to the conclusion that Surlekar/Pw3 was an independent witness and reliance could be placed upon his evidence. It is only sustained and incisive cross examination which has ultimately brought out the fact that Surlekar/Pw3 had stood as a panch witness in four cases prior to this namely, crime nos. 3, 4, 10 and 12 of ANC Police Station, as admitted by PI Uday Naik/Pw4, on 15.03.2004. Surlekar/Pw3 also admitted that he had acted as a panch witness at the instance of the Panaji Police Station in two to three cases and had also admitted that he acted as a panch witness in another two cases in drug raids where there was no recovery. The evidence of Surlekar/Pw3 ultimately shows that he had stood as a panch witness atleast in about seven cases prior to the case at hand. However, what is to be noted is that there was a consistent effort made both by Surlekar/Pw3 as well as by PI Uday Naik/Pw4, to evade answers in that regard. It is only on 03.01.2005, that PI Uday Naik/Pw4 stated clearly that Surlekar/Pw3, had acted as a panch witness in about 18 drug cases in which he was either an I.O. or a member of the raiding party. Earlier, Surlekar/Pw3 on 08.01.2004 had admitted that he had acted as a panch witness in other cases of ANC Police Station but when it was specifically suggested to him that he had acted as panch witness in 13 cases of ANC Police Station, he had denied the suggestion. Again, Surlekar/Pw3 had stated that he had acted as a panch witness at the instance of ANC Police Station only in raids conducted in

North Goa, but he was compelled to admit that he had acted as a panch witness also in the case of B. Chandra Mohan, which was at Sancoale at South Goa. The case of ***B. Chandra Mohan*** was decided by this Court in Appeal no. 53/04 by Judgment dated 24.03.2006 ***(06(4) AIR Bom. R. 106)***. Surlekar/Pw3 also stated that he knew PI Uday Naik/Pw4 since his childhood i.e. for over thirty years and that they were both residing at Mala. If Surlekar/Pw3 made an attempt not to disclose that he had stood as a panch witness in 18 cases, PI Uday Naik/Pw4, did not lag behind. On 15.03.2004, when PI Uday Naik/Pw4 was questioned about that aspect, PI Uday Naik/Pw4 stated that Surlekar/Pw3 had acted as a panch witness in drugs cases but he did not recall the number. He also stated that he did not inquire with him as to the number of times he had acted as a panch witness in drugs case for no specific reason. If at all PI Uday Naik/Pw4 did not inquire from Surlekar/Pw3 as to in how many cases he acted as a panch, the reason is not very far to find and it is because he well knew that Surlekar/Pw3 was a regular and stock panch witness. On 25.02.2004 PI Uday Naik/Pw4 again stated that he did not recall in how many raids Surlekar/Pw3 had accompanied him for drug raids but to another question, he conceded that they were maintaining a FIR register which he was required to verify and depose on the next date. This was on 25.02.2004 and it is only on 15.03.2004, that in further cross examination, that PI Uday Naik/Pw4 admitted that Surlekar/Pw3, had stood as a panch witness in 18 cases relating to ANC Police Station and in four cases, as already stated, prior to the case

at hand, which fact he had again confirmed on 03.01.2005, by admitting that Surlekar/Pw3 had acted as a panch witness in about 18 drugs cases in which he was either an I.O. or member of the raiding party and this only shows that on 25.02.2004 PI Uday Naik/Pw4 was only feigning ignorance that he could not recall the number of cases in which Surlekar/Pw3, had stood as a panch witness in drugs cases. As far as the other panch witness Shri Bengre (Cw2), who was not examined, PI Uday Naik/Pw4 stated that he had not asked Shri Bengre, whether he had acted as a panch witness in narcotic raids prior to this case and yet PI Uday Naik/Pw4 stated that he had satisfied himself on the respectability of the panch witnesses. When further questioned and a suggestion was put that Shri Bengre (Cw2) had stood as a panch witness in drug raids numbering about five, he stated that he could not answer the suggestion for want of records and added that he could not correctly recall whether Shri Bengre was a panch witness in an earlier drug raid prior to this case. It was specifically suggested to him that the said Shri Bengre was involved in three criminal offences in relation to Calangute Police Station but PI Uday Naik/Pw4 stated that he could not say anything to that suggestion and further stated that he could not say anything to the suggestion that Bengre had acted as a panch witness in more than ten cases. Surlekar/Pw3, was a panch witness in the said case of ***B. Chandra Mohan*** (supra), wherein it was observed that he had stood as a panch witness twice prior to the raid in that case i.e. 29.01.2002 and thereafter, on 15 occasions and that fact was admitted by Shri

D' Souza/Pw5, in that case. Shri D' Souza, who is also Pw5 in this case, had admitted in that case that during most of the raids, where Pw3/Surlekar was a panch witness, he was present and in that context, the following observation was made by this Court :

> "I really fail to understand as to what sort of Superior Officer DySP D' Souza/Pw5 is so as to not have advised PI Paes/Pw4, (the I.O. in that case), that he should desist from engaging a panch witness in so many cases and this inspite of the Government having given instructions to call on Government servants to act as panchas."

Shri Bengre, (Cw2), was a panch witness in the case of ***Dansur Ghartimagar v. State of Goa***, which was decided by this Court on 13.12.2006, in Criminal Appeal No.41/2005. The said Bengre was examined as Pw3 in that case and PI Shri Paes, was the Investigating Officer and the said Paes had admitted that the said Shri Bengre, had acted as a panch witness at his instance in about 4 to 5 cases. In that case, this Court had observed that the evidence of Bengre showed that he was arrested in one theft case along with another person and was released on bail and was acquitted in that case. It was also noted that Bengre had stated that he did not know if two theft cases were registered against him at Calangute Police Station and it was observed that the answers given by the said Shri Bengre, gave a clear impression that he was involved in more than one theft case of Calangute Police

Station.

8. The learned trial Court has relied on several Judgments to come to the conclusion that Surlekar/Pw3 could still be considered to be an independent witness. In fact, PI Uday Naik/Pw4 in his cross examination had admitted that he was aware about the Government Circular which required Government employees to be taken as panch witnesses. When questioned further on that aspect, PI Uday Naik/Pw4 stated that he could not make any affirmative statement about procuring or attempting to procure any Government employee as a panch witness because according to him, the relevant file in the office was misplaced. If PI Uday Naik/Pw4 was aware about the said Government Circular which required that Government employees be taken as panch witnesses, there has been no explanation from PI Uday Naik/Pw4 as to why he did not adhere to the said Government Circular and ensure that Government employees were called for as panch witnesses assuming he was otherwise unable to get independent witnesses to witness the raid which was conducted by him. His evidence shows that he had more than sufficient time to procure independent witnesses or Government employees to accompany him for the said raid but chose to ignore the Government Circular for reasons best known to him and took Surlekar/Pw3, a person who had acted as a panch witness on more than seven occasions, to accompany him for the raid.

9. In ***Ramesh Kumar v. State of Himachal Pradesh (2002 Cr.L.J. 1880)***, the learned Division Bench had observed that merely because a witness had in the past appeared as a prosecution witness in two cases, would not render him to be labelled as a stock witness in the absence of any other evidence to show that he was a stock witness. That observation certainly could not have been imported to give any credibility to Surlekar/Pw3, being an independent witness. In the case of ***Joseph Fernandes v. State of Goa (2000 Cri. L.J. 3485)***, the facts do not show as to in how many occasions, the panch witness had stood as a panch witness and, therefore, the observation of the Hon'ble Supreme Court that if a person happened to witness other instances that would not denude him of his independent character, would not be of any significance to this case. In ***Mohammed Salim Mohammed Issak Shaikh v. State of Maharashtra (2000 Vol. 102(2) Bombay L. R. 243)***, the learned Division Bench observed that the circumstance that the public panch is a habitual panch would certainly weigh with the Court if it finds that the evidence of police witnesses is not free from blemish. In that situation the circumstance that the public panch was professional would certainly be an impediment in the way of the Court in confirming a conviction in a case under the N.D.P.S. Act. This observation could squarely apply to this case. In ***Deepak Ghanshyam Naik v. The State of Maharashtra (1989(1) Bom. C R. 574)***, the panch witness had admitted in cross examination that he had acted as a panch once or twice and on that count, he

was sought to be labelled as a professional panch witness but that contention was not accepted by the learned Division Bench by observing that he was not a person doing anything and was not under the police obligation to act as a panch witness as he had a fruit business in Karnataka. Lastly, reference could be made to ***State of Gujarat v. Kumuchandra Pranjivan Shah (1997 S.C.C. (Cri) 750)***, wherein the Apex Court observed thus:

> "On appeal preferred by the respondent before the High Court of Gujarat, the Division Bench of the Gujarat High Court, inter alia, came to the finding that the panch witness though initially tried to give a picture before the Court that he had not acted as a panch witness, it was established by cogent evidence that he had acted in a number of cases as a panch witness and there were good reasons to believe that he was a pliable witness not worthy of evidence. So far as the police witness is concerned, the High Court has also held by indicating that the police officer initially did not speak out the truth and tried to suppress that the said panch witness had acted as panch witness in earlier cases. Considering the aforesaid fact the High Court was of the view that the said witnesses did not appear to be reliable and reliance should not be placed on their deposition. Accordingly, the High Court was of the view that the prosecution had failed to establish the case beyond reasonable doubt and passed the

aforesaid Judgment acquitting the respondent."

The Judgment of the High Court was affirmed by the Supreme Court.

10. As already stated, PI Uday Naik/Pw4, inspite of knowing of clear Government instructions that he could take Government servant as panch witnesses, took, if at all, Surlekar/Pw3, who had acted as a panch witness on more than seven occasions. The fact that he had stood as a panch witness in about 18 cases was sought to be suppressed from the Court both by Surlekar/Pw3 as well as PI Uday Naik/Pw4 at the initial stages of their cross examination. In my view, the evidence of a person who stood as a panch witness on more than four or five occasions, cannot be said to carry any value. By no stretch of imagination, could Surlekar/Pw3, be considered as an independent witness and he was a pliable witness, being a stock panch witness, in the hands of PI Uday Naik/Pw4, as well as Shri Paes/Pw7, having accompanied them in about 18 cases in all both prior and after the present case. As observed by this Court in ***Aspaq N. Ahmed v. State of Goa (2006 (2) AIR Bombay Reporter 111)***, the fact that the panchanama and the seizure report was signed by the panchas is no guarantee that the panchas were really present at the scene. Such signatures can also be obtained from pliable witnesses and that could happen in the case of Surlekar/Pw3 as well. In this context, reference could also be made to the Judgment of the Division Bench of

this Court in the case of ***Bhagwatsingh Gaud v. State of Goa*** (Unreported Judgment dated 01.12.1997 in CRIA No. 43/1996), wherein this Court observed that the minimum care expected of a search office of a PI level is that he takes independent witnesses to witness the search and seizure transaction and if such officer does not act with reasonable prudence, the entire search may become doubtful. That is precisely the case at hand that PI Uday Naik/Pw4, inspite of knowing about the said Government Circular, and inspite of having had sufficient time, chose not to call upon any independent witness or for that matter, a Government servant as a panch witness and called upon two pliable witnesses to accompany him for the raid, which he conducted. This is not a case where the panch witness has turned out to be hostile to the case of the prosecution and the evidence of the PI Uday Naik/Pw4, inspires confidence. In the absence of an independent witness being taken, the entire raid as conducted by PI Uday Naik/Pw4, would not remain free from doubt.

11. The next aspect which requires to be considered is the possession of room no.4 of the said Silver Moon Guest House, situated at Sorrantowaddo, belonging to Maria Fernandes/Pw6. This is of utmost importance considering that major quantity of 1.31 kilos of charas was found in the said room. Whether the said quantity was found on the dressing table as stated by PI Vincy Paes/Pw7 or by the side of the dressing table as stated by other witnesses including PI Uday

Naik/Pw4, is a different matter. PI Uday Naik/Pw4 has admitted in his cross examination that he had investigated about 25 drugs cases during his posting at the ANC Police Station and that about a dozen such cases pertain to the foreigners. He also admitted that he was aware that whenever drugs are found in a room purportedly occupied by a foreigner, it is necessary to establish the nexus between the foreigner and the room and that the said room is in exclusive possession of the said foreigner. He also admitted that in respect of any foreigner, occupying a room or a house locally, the owner of the house had to submit a 'C' form in respect of the foreigner to the concerned Police Station, which is countersigned by the foreigner.

12. The chargesheet against the accused was filed by PI Uday Naik/Pw4 on 23.01.2003, and prior to that, on or about 17.12.2002, on behalf of the accused, an application was filed to obtain direction to Officer in Charge of ANC Police Station to produce 'C' form of Ms. Maya Patt, an Israeli National. It has been the case of the accused in the said application, that when the accused was arrested on 02.12.2002, the said room was occupied by the said Ms. Maya Patt, an Israeli National. In reply to the said application, PI Uday Naik/Pw4 had stated he was in no way connected with the 'C' form of the said Ms. Maya Patt, if at all she was residing in Goa, at the relevant time, to the best of his knowledge. Eventually, the said application filed on behalf of the accused dated 17.12.2002, was rejected by the learned Special Judge. The Records and Proceedings show that subsequently

on behalf of the accused, an application was filed dated 06.03.2003, producing a xerox copy of the 'C' form of the said Ms. Maya Patt, again stating that the room from which the accused was arrested, was occupied by the said Ms. Maya Patt, an Israeli National. However, it appears that both the prosecution as well as the defence lost sight of the said 'C' form of Ms. Maya Patt, as the trial progressed, (herein after referred to as exhibit 4, as it was filed along with it). Neither Maria Fernandes/Pw6 nor PI Uday Naik/Pw4 were shown by the defence the said 'C' form of Ms. Maya Patt. However, the fact remains that Maria Fernandes/Pw6 has stated, that she had submitted the 'C' form of Ms. Maya Patt, as well. According to PI Uday Naik/Pw4, the copy of the 'C' form of the accused was produced by Maria Fernandes/Pw6, when he recorded her statement on 12.12.2002. However, PI Uday Naik/Pw4 did not produce the said 'C' form when he was examined before the Court on 16.02.2004, 25.02.2004 or for that matter, on 15.03.2004. The said 'C' form being a carbon copy, retained by Maria Fernandes/Pw6, came to be produced by her for the first time on 28.07.2004. However, the learned Special Judge did not allow it to be produced and exhibited presumably because it was a carbon copy. In fact, the learned Special Judge, ought to have allowed its production, being a carbon copy since a carbon copy is made by one uniform process within the meaning of explanation 2 to Section 62 of the Evidence Act. If any authority to support such proposition is required, then reference could be made to P***rithi Chand v. State of Himachal Pradesh (AIR 1989 S.C. 702)***. However,

the said carbon copy produced by Maria Fernandes/Pw6, is at page 189 of the paper book and it shows that it was given in relation to the accused. However, what is important to be noted is that there is no room number mentioned on it. There is also no name of the Guest House of Maria Fernandes/Pw6 and nor does it have a house number. The house number mentioned on it is 854 and Maria Fernandes/Pw6 has fairly conceded that the said number pertains to her residential house which is at a distance of about 20 metres (it could not have been 20 kms, as typed) from her residential house. She has again fairly conceded that the said Guest House had no separate house number. One fails to understand as to how the said Guest House does not have a house number when it is located at some distance from the house of Maria Fernandes/Pw6 even in case the same was subsequently illegally built or renovated. Suffice it to observe that the carbon copy produced by her on 28.07.2004 or for that matter the xerox copy which was produced by PI Uday Naik/Pw4 on 12.09.2005 and the original produced on 16.02.2005 (Exhibit 66) do not have either the room number or name of the Guest House or its house number to show that the accused was residing in a particular room of the said particular Guest House. The same is the case with 'C' form of Ms. Maya Patt, produced on behalf of the accused, exhibit 4. The said 'C' form of the accused could not be said to be pertaining to room no.4 of the said Guest House so as to establish on the basis of it that accused was occupying room no.4. However, the controversy does not end there. Maria Fernandes/Pw6 was examined before

the Court on 28.07.2004, and in her examination in chief, she stated that she had allotted room no.4 to the accused on rent of Rs.200/- per day and had submitted the 'C' form containing the particulars of the accused at Anjuna Police Station of her Guest House bearing no. 854. She further stated that the accused stayed in the said room no.4 in the Guest House, till the arrest by the police on suspicion for possession of drugs. In cross examination, she admitted that she had also submitted 'C' form in respect of another foreigner by name Ms. Maya Patt, on the same day, as that of the accused but in cross examination, she stated that Ms. Maya Patt was also staying in room no.4. Again, she stated that Maya Patt was occupying room no.4 of her Guest House on the date when the accused was arrested by the police though she stated that she had no personal knowledge of the place from where the accused was arrested. She also stated that she had submitted a copy of 'C' form relating to Ms. Maya Patt, when the police came to record her statement. This 'C' form of Ms. Maya Patt was never produced by PI Uday Naik/Pw4, copy of which was produced on behalf of the accused, exhibit 4. In further cross examination she stated that she did not continue in room no.4 after the arrest of the accused and that the police had locked the room no.4 and, as such, no question arose of her continuing in the room. Again she stated that thereafter the said Maya Patt continued to occupy room no.4 and before her cross examination could be ended, Maria Fernandes/Pw6 reiterated that Maya Patt had dealings with her in respect of room no.4 and the accused had no dealings with her

in respect of the said room. She was not re-examined by the prosecution after the close of her cross examination. The 313 statement of the accused came to be recorded on 04.01.2006 and after recording of the said statement, an application was filed on 16.01.2006 for her cross examination and consequent to the order passed thereon on 18.01.2006, she was cross examined by the prosecution on 25.01.2006. She was shown one letter purported to have been written by Ms. Maya Patt to the Superintendent of Police and signed by her (exhibit 114), but she flatly denied that she had signed the said application. One fails to understand as to how an application made by one person and signed by another could have ever been processed by the Superintendent of Police. In further cross examination by the learned Public Prosecutor, she again reiterated that she had a photocopy of the 'C' form of Maya Patt since the carbon copy was available with her and was taken by the police along with that of the accused and the said photocopy was available at her residence. It was specifically suggested to her by the learned Public Prosecutor that she had not submitted any 'C' form in respect of Maya Patt at any time or on 13.12.2002, but she denied the said suggestion. In further cross examination, she stated that the accused was residing in room no.4 of her Guest House at the time of his arrest but at the same time, she denied the suggestion that she had falsely stated that Maya Patt was residing with the accused in room no.4. She stated that the keys of the room were not handed over to her after the arrest of the accused of room no.4. In her further cross examination, on behalf of the accused, she again

stated that Maya Patt continued to occupy room no.4, even after the arrest of the accused and before the end of the cross examination on behalf of the accused, she again reiterated that Maya Patt was residing in room no.4 as on the date of the arrest of the accused. The learned trial Court has observed that Maria Fernandes/Pw6, could be described as a person running with the hare and hunting with the hound. In view of several inconsistent statements made by Maria Fernandes/Pw6, there were two options open before the learned Special Judge, one to discard her entire evidence as being inconsistent since she had stated at one stage that it is the accused who was occupying room no.4 and at another stage, that it is Maya Patt, who was occupying room no.4. I am inclined to believe the second version given by Maria Fernandes/Pw6, i.e. it is Maya Patt, who was occupying room no.4 because she has been more consistent in stating the said fact. It is stated on the seizure report, exhibit 27, that the keys of the room would be handed over to the owner and so also in the panchanama it is stated that the custody of the key was taken to be handed over to the owner of the said room, after locking it. When PI Uday Naik/Pw4 was questioned about the said key of room no.4, he stated that he could not hand over, since the owner was not available. In further cross examination, he stated that he had met Maya Patt on the same evening of the arrest of the accused and had informed her about the grounds of arrest of the accused. It is to be noted that this is the same witness who earlier in his reply to application dated 17.12.2002, was not even prepared to accept that Maya Patt was residing in

Goa. PI Paes/Pw7 stated that they had met Maya Patt on the road at Sorrontowaddo, Anjuna, while returning from the raid and she was identified by the accused by pointing out to her. He admitted that PI Uday Naik/Pw4 had spoken to the said Maya Patt and obtained her Passport details personally. The very fact that PI Paes/Pw7 had admitted that they had met Maya Patt whilst returning from the raid and the fact that PI Uday Naik/Pw4 had subsequently admitted that he had met her and had informed her about the grounds of arrest goes to show that the said Maya Patt had accompanied them from the place of the raid to the ANC Police Station and if that is so, it is quite possible if not probable that she was very much present in the room from where the accused was arrested. PI Uday Naik/Pw4 specifically denied the suggestion that Maya Patt was present in the room from which the accused was arrested. He was then questioned to find out whether there was any record to show that the key of the room no.4 was handed over to Maya Patt and initially he answered by stating that there was no such record but later on he added and stated that PI Paes/Pw7 had handed over the key to Maya Patt on 04.12.2002 and obtained a receipt from her. PI Paes/Pw7 on this aspect has stated that on 04.12.2002, he handed over the key of the room to Maya Patt under the instructions of the accused and obtained an acknowledgment. There is absolutely no explanation either from PI Uday Naik/Pw4 or for that matter, from PI Paes/Pw7, as to why the key of the room which was brought by them, to be handed over to Maria Fernandes/Pw6 and which admittedly belonged to her

Guest House, had to be returned to Maya Patt, in case she had no connection whatsoever with the said room no.4. The explanation given by PI Paes/Pw7 that he gave the said key to Maya Patt because of the instructions of the accused, is hard to be believed. The fact that the room was locked, its key was brought and then handed over to Maya Patt, is a strong indication to believe that it is the said Maya Patt who was in occupation of the room, whether room no.4 or not, from which the accused was arrested. This fact supports the last version given by Maria Fernandes/Pw6. Therefore, the accused could not have been convicted for having been found in possession of 1.35 kgs of charas from the said room.

13. A case similar to this was considered by this Court in ***Vijay Verma v. State of Goa (unreported decision dated 30/31 August, 2001, in CRIA No. 13 of 2001***). This Court referred to the case of ***Anandi Charan Parida v. The State (1997 Cri. L. J. 2202)***, wherein the accused was found alone in the house when the surprise raid was conducted. It was observed in that case that:

> "Merely because the accused found in the house from where the contraband articles were allegedly seized, it cannot be assumed that he was either the owner of the house or in possession. It is quite possible that the accused had gone there for some other purpose. Whether the accused was in possession of the house or not could have easily proved by the prosecution by

> examining the neighbours or other persons having personal knowledge in the matter as well as by proving the relevant documents relating to ownership/possession of the house. In the absence of any such evidence it would not be proper to come to a definite conclusion that the accused was in fact in possession of the house merely because he was found in the house at the time of alleged search and seizure. The articles were found from inside the room but not from the possession of the accused. Therefore, it cannot be said that the accused was found in possession of contraband articles."

This Court also has referred to the decision of the Apex Court in ***Mohd. Alam Khan v. Narcotics Control Bureau, (1996 Cri. L.J. 2001)***, wherein it was observed thus:

> "The prosecution did not bother to produce any independent evidence to establish that the appellant was the owner of the flat in question by producing documents from concerned Registrar's office or by examining the neighbours. No statement has been made by the prosecution that in spite of the efforts taken by them, they could not produce the documents or examine the neighbours to prove the ownership of the appellant relating to the flat in question."

In my view, the prosecution has miserably failed to prove that it was the accused who was in possession of the said room. The case of the accused that he was arrested from the room in the possession of Ms. Maya Patt, appears to be far more probable than the case of the prosecution and, therefore, the accused could not have been convicted for possession of the said 1.31 kgs of charas.

8. Although the carbon copy of 'C' form was produced by Maria Fernandes/Pw6, on 28.07.2004, its original was produced by Prabhudessai/Pw8 on 16.02.2005, at exhibit 66, although the said original was forwarded by him earlier to PI Uday Naik/Pw4 on 16.01.2003 and one does not know why PI Uday Naik/Pw4 did not produce the said original or for that matter the carbon copy later produced by Maria Fernandes/Pw6, when he was examined before the Court on 16.02.2004, 25.02.2004 or for that matter on 01.05.2004. Prabhudessai/Pw8 after he produced the original 'C' form of the accused, was asked to produce the inward register for Foreigner's Registration Office. It is submitted that the said inward register was required by the defence to show that the 'C' form of Maya Patt was also submitted first to Anjuna Police Station and thereafter forwarded by them to F.R.O. However, he produced a register pertaining to the period from 19.02.2002 to 28.02.2002, further explaining that they had discontinued maintaining the register of 'C' forms from 28.02.2002, which obviously meant that 'C' forms

submitted after 02.12.2002 were not being entered on any register. This he stated inspite of the fact that earlier on 16.02.2005, he had stated that he had made personally a record on the new register of the 'C' form, exhibit 66. It is obvious that by making inconsistent statement, Shri Prabhudessai has proved himself to be unreliable. With a view to prove that Maya Patt had also submitted a 'C' form, which might have disclosed that it is she who was in possession of the room from which the accused was arrested, on 07.05.2005, PI Uday Naik/Pw4 was asked to produce the register from Anjuna Police Station and he appeared before the Court on 12.09.2005 and stated that he was not in a position to produce the said register as he was on leave due to hospitalization and he undertook to produce the same on requisition being made to Anjuna Police Station. Nevertheless, he produced a letter dated 07.01.2003, along with a xerox copy of 'C' form of the accused. It is submitted on behalf of the accused that this xerox copy is fabricated as on that date i.e. 07.01.2003, the original of 'C' form was with Prabhudessai/Pw8 and the carbon copy was with Maria Fernandes/Pw6 and moreover the number 15435, which can be seen on the original of 'C' form, exhibit 66, is not seen on the xerox copy purported to have been forwarded along with letter dated 07.01.2003, which according to the learned Counsel, is another attempt in fabrication of a document. Be that as it may, in further cross examination, he stated that he was not aware if Anjuna Police Station was maintaining a register of 'C' forms and his cross examination was adjourned on 12.09.2005 with a direction to him to produce the

register of 'C' form of Anjuna Police Station. On 17.09.2005, PI Uday Naik/Pw4 appeared again before the Court and stated that he had received a wireless message from the Anjuna Police Station stating that the register of 'C' forms upto the year 2002, was destroyed in view of the order of the Superintendent of Police and to support such a statement, PI Rajesh Kumar/Pw9, was examined on 10.10.2005, who stated that the new register of 'C' forms maintained at Anjuna Police Station was destroyed as per the order of the Superintendent of Police as to weed out the files. To the same effect, PI Lawrence Fernandes/Pw10, was also examined and ultimately the said register and 'C' form was not produced. Head Constable Pednekar/Pw11, was examined on 28.11.2005, who also stated that he had prepared a list of old records to be destroyed and had destroyed the same. His evidence shows that there has been clear attempt to destroy about 50 pages for the month of December 2002, on which the 'C' form either of the accused or Maya Patt, might have been registered. There is no apparent reason otherwise why he had to remove the pages of the register and convert the register as a register only from January 2003 to 16.02.2003. This attempt at destruction apparently could not have been done without the instruction of PI Uday Naik/Pw4. There has been a sustained and concerted effort made to ensure that the Register was not produced so that submission of 'C' form of Ms. Maya Patt could be withheld.

09.03.2007

9. There is another aspect which needs consideration and this is in respect of the inconsistencies which throw a great amount of doubt on the veracity of the versions given by PI Uday Naik/Pw4. Superior Police officers, if prudent, (i.e. Pw4, Pw5 and Pw7), ought to have immediately contacted the Manager or the owner of the said Guest House after the completion of the formalities of seizure in one of the rooms of the said Guest House and then recorded the statement of such Manager or owner and seize the relevant records which would have supported their case regarding the occupation of the room by a particular person. PI Uday Naik/Pw4 has stated that during the course of the raid, he did not make any inquiry in relation to the occupancy of room no.4. He has also stated that he did not record the name of the owner of the Guest House in his complaint. He has admitted that the name of the owner of the Guest House was not disclosed to him by the informant. Admittedly, the name of the owner of the Guest House is not recorded in the said information reduced into writing by PI Uday Naik/Pw4. In further cross examination, PI Uday Naik/Pw4 stated that the identity of the owner of the room that it belonged to Maria Fernandes/Pw6, he came to know from the locals while returning from the said room. PI Vincy Paes/Pw7, has also admitted that he did not know the name of the owner of the said Guest House till the said night. The inference which follows from the said two statements of PI Uday Naik/Pw4 and PI Shri Paes/Pw7 is that while they were in the room, they did not know the name of the owner of the said Guest House. However, PI Uday

Naik/Pw4 has admitted in his cross examination that the name of the owner of the Guest House is recorded in the letter to the Director of Foods and Drugs Administration, exhibit 10, and the panchanama, exhibit 26. As rightly pointed out on behalf of the accused by the learned defence Counsel, these two documents could not have been prepared in the said room, as otherwise claimed by the prosecution witnesses in case both PI Uday Naik/Pw4 and PI Paes/Pw7, did not know the name of the owner whilst they were in the said room. Moreover, Exhibit 10 is a type written document and it is nobody's case that it was typed in the room of the Guest House. The version that the said two documents were prepared in the said room as claimed by the prosecution is therefore not free from doubt. Added to it, there are also other inconsistencies. For example, as per PI Uday Naik/Pw4 and PI Paes/Pw7, letter handing over the seal as well as the seal used for sealing the seized articles was handed over to PI Paes/Pw7 at the scene while according to Shri D'Souza/Pw5, the letter for handing over the seal was done at the Police Station and the seal was handed over there, which shows that there is also no corroboration as far as the Police Officers themselves are concerned regarding the vital aspects of the case. The evidence of the custody of the seized articles (charas) after its seizure is no better. They were sent to the office of S.P on 04.12.2002 and received there on the same day by Shri Mapari/Pw2, who despatched them on the same day to the Directorate of Food & Drugs Administration where they were examined by Kaissare/Pw1 and confirmed to be

charas. PI Paes/Pw7 stated that at the Police Station, he took the muddemal on the muddemal register under serial no. 13/02, a copy of which he produced at exhibit 53, and stated that on 04.12.2002, he deputed lady Head Constable Ms. Rane to the office of the SP, CID, Crime Branch, Panaji, and took the signature of the said lady Head Constable on the muddemal register. Immediately he changed the aforesaid statement and stated that on 03.12.2002, he had deputed Constable Buckle no. 4534 to the office of the S.P. but he had returned back and reported that the office of the S.P. was closed, being a public holiday and handed over the muddemal property to him and he made necessary entry in the Station diary, a copy of which was produced at exhibit 54. In cross examination, he admitted that generally entries are made in the muddemal register when property along with the letter are handed over to the carrier and the signature obtained in acknowledgment of receipt of the property. At the same time, he conceded that he had not made any entry on the Police diary that he had deputed Constable Buckle no. 4534 to the office of the SP with the stated property and that he had returned on 03.12.2002 but again added and stated that there was a Station diary to that effect but further admitted that he had not taken the signature of the said Constable Buckle No. 4534 for carrying the said article on 03.12.2002. He also admitted that the muddemal register is silent on the movement of the attached property on 03.12.2002, and there is no record in the Station diary or the signature of Constable Buckle no.4534 of having travelled with the muddemal property after having received the

same from him on 03.12.2002. He also admitted that the entries on 03.12.2002 at exhibit 54, are in his handwriting but the preceding entries of 03.12.2002 are not in his handwriting. He denied the suggestion that the muddemal had never been deposited with him in safe custody either on 02.12.2002 as also on 03.12.2002 or that it was lying unattended till 04.12.2002 and the entries on the Station diary dated 02.12.2002 and 03.12.2002, were false and fabricated.

10. The copy of the muddemal register, exhibit 53, does not show that it was signed by lady Head Constable 3250, Ms. Rane, and the said Ms. Rane has not been examined. Similarly, the Station diary, exhibit 54, also does not carry the signature of Constable Buckle no. 4534 and he too has not been examined. The muddemal property and the Station diary are not on speaking terms, so to say, and therefore, the version of PI Paes/Pw7 that they were in his custody from 02.12.2002 to 04.12.2002, is not free from doubt. This Court has observed time and again that the Courts have always frowned upon the practice of Police Officers keeping the custody of the seal as well as of the seized articles for long in the hands of the same Officer. In other words, a person who has the custody of the seized articles and the seal used to seal the same, should not continue to have both for long because such practices can lead to tampering with the seized articles. The Act has taken special care that in normal course, after the seizure, the seized drug should be handed over in the custody of the Officer in charge of the nearest Police

Station. No such provision is made in the case of the seal. The good purpose, the safe guards created, assurance rendered, gets frustrated by allowing such an Officer to have the seals in his possession as well as the sealed articles in his possession or custody. When sentence provided is severe, the procedures followed should be above suspicion and above board. In other words, the Officer having the custody of the seized articles and the custody of the seals used to seal the articles, should not be the same. All these procedures are required to be followed in order to avoid the possibility of tampering with the sample and to lend assurance to the Court that in the given case, there was no such tampering. As observed by the Apex Court in ***Rajesh J. Avasti v. State of Goa (2004 Drugs Cases (Narcotics) 322)***, the question was not how much was seized but whether there was actual seizure and whether what was seized was really sent for chemical analysis and since prosecution was unable to explain the discrepancy, it rendered the case of the prosecution doubtful and that, what could be least said was that serious doubt was created about the truthfulness about the case of prosecution.

11. Before concluding, it must be observed that PI Uday Naik/Pw4, was re-examined, cross examined, etc., on nine occasions in a span of almost two years and such a course of trial is certainly not in the interest of either the prosecution or the defence.

12. It appears that PI Uday Naik/Pw4 was only interested in securing pliable witnesses to witness the search and seizure. This is not the case where panch witness has turned hostile to the case of the prosecution and the evidence of PI Uday Naik/Pw4, inspires confidence. If the case is ending in acquittal, it is because of the sins of omission and commission on the part of PI Uday Naik/Pw4 including of not taking independent witnesses to witness the seizure and manipulating other documents. As stated by this Court in ***Vikram Reddy v. State of Goa (2002 Bom. C.R. (Cri.) 499)***, "*If, the evidence of P. W.4, P.S.I. Uday Naik, stands discredited, it not only affects the credibility of the officers conducting the search but also affects the basic fabric of the prosecution case. The only irresistible conclusion that can be drawn from the evidence is that the contraband was neither seized nor the seal affixed at the scene of the offence as claimed by the prosecution*."

13. As a result of the above discussion, the accused certainly was entitled to be given benefit of doubt. Hence I allow the appeal and set aside the conviction and sentence imposed upon the accused by the learned Special Judge. Consequently, the accused shall stand acquitted under Section 20(b)(ii)(C) of the Act. He shall be set to liberty forthwith in case he is not required in any other case.

N. A. BRITTO, J.

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